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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2012 MAR -8 AM 8:35

SANDRA K. HARKHAM, CLERK
BY: Jacqueline Harshman

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF YAVAPAI, STATE OF ARIZONA

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300 CR2010-01325

MOTION TO RECONSIDER

(Oral Argument/Evidentiary Hearing
Requested)

James DeMocker, by and through counsel undersigned, hereby moves this Court to reconsider¹ its order that he travel to Arizona for a deposition in *State v. Steven DeMocker*. This Motion is based upon the entire record before the Court, as well as upon the attached Memorandum of Points and Authorities.

DATED this 7 day of March, 2012.

ASPEY, WATKINS & DIESEL, P.L.L.C.

By 

Bruce S. Griffen

¹ ARCP 16.1(d) provides that upon a showing of good cause a previously decided issue can be reconsidered. James DeMocker raises procedural error and dispositive case law to establish the required good cause.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

On August 29, 2011, Deputy County Attorney Jeffrey G. Paupore issued a Subpoena Duces Tecum, commanding James DeMocker to produce for examination his “complete file referring, relying, and or pertaining to all of the Yavapai County Superior Court Cases titled the *State of Arizona v. Steven DeMocker*...”

On January 6, 2012, the State filed a “Motion Pursuant to Rule 15.3,” requesting a deposition of James DeMocker and requesting an expedited hearing on the Motion. James DeMocker submitted a Response to the State’s Motion and moved this Court to quash the subpoena. On January 19, 2012, Judge Donahoe issued an order denying the State’s Motion Pursuant to Rule 15.3, finding that this Court did not have personal jurisdiction over James DeMocker, and finding that the State needed to follow appropriate procedure for having a subpoena issued by a court in Virginia.

On January 31, 2012, Deputy County Attorney Jeffrey Paupore submitted to this Court an Affidavit Requesting Attendance of Out-of-State Witness. As described below, such is the procedure for securing the attendance of witnesses at trial. Paupore asserted in this Affidavit that James DeMocker was a necessary witness because of knowledge and experience that Paupore alleges James DeMocker to have, or to have had, in relation to the State’s case against Steven DeMocker.

1 The affidavit indicated there was a trial set for March 26, 2012, but gave no
2 date, time and place for any deposition. The affidavit alleged James DeMocker was
3 necessary "for issues to be determined at the deposition" but never indicated he had
4 been uncooperative. Accordingly, the affidavit does not meet the requirements of
5 ARCP 15.3.
6

7 On February 22, 2012, Judge Donahoe issued a "Certificate of Judge
8 Requesting Attendance of Out-of-State Witness." This certificate orders James
9 DeMocker to appear at a deposition on March 14, 2012.
10

11 On February 28, 2012, the certificate was served upon James DeMocker's 18-
12 year old son, along with an order for James DeMocker to appear at the Circuit Court of
13 Fairfax County, Virginia, on March 2, 2012, to show cause why he should not be
14 ordered to appear at the March 14 deposition with the documents specified by the
15 State. James DeMocker appeared on March 2, 2012. He advised the Virginia court
16 that he had not been properly ordered to attend any deposition, that he could not
17 legally be required to attend a deposition in Arizona, that such attendance would be a
18 hardship, and that he had not been properly compensated to attend the deposition.
19 Nonetheless, the Virginia court affirmed this Court's Order for James DeMocker to
20 appear for the March 14 deposition.
21
22

23 James DeMocker has not received an airline ticket for travel for either to the
24 March 14 deposition, nor for travel to testify at the subsequent trial.
25
26

1 **II. LAW**

2 Ariz. Rev. Stat. § 13-4093 covers the requirements to command a person who
3 does not live in Arizona to attend a trial as a witness in Arizona. This statute codifies
4 the procedures necessary under the Uniform Act to Secure the Attendance of Witness
5 from without a State in Criminal Proceedings. This statute covers “commanding
6 persons...to attend and testify in criminal prosecutions, or grand jury investigations.”
7
8 A.R.S. § 13-4093(A). This statute does not cover commanding persons to attend
9 depositions in other states.
10

11 Ariz. Rev. Stat. §§ 13-4111 - 13-4116 address the procedure for deposition of a
12 witness from outside of Arizona. These statutory sections address only deposition of
13 witnesses upon request of the defendant.
14

15 Rule 15.3 of the Ariz. R. of Crim. P. covers the requirements for deposing a
16 witness in a criminal case. This rule requires filing a written motion with the court, a
17 showing that the deposition is necessary to investigate the offense, and a showing that
18 the proposed deponent is uncooperative. The motion must specify time, place,
19 address, and papers to be brought, and notice must be given pursuant to civil
20 procedures.
21

22 Under *Fenton v. Rogers*, 115 Ariz. 217, 564 P.2d 906 (App. Div. 2 1977), “it is
23 presumed that the defendant will be examined at his residence or place of business or
24 employment.” An out-of-state deponent cannot be required to travel to Arizona for the
25 purpose of a deposition, unless unusual circumstances justify putting a deponent
26

1 through "the inconvenience of coming to Arizona for his deposition." *Id.* at 218, 564
2 P.2d 907
3

4 **III. ARGUMENT**

5 This Court cannot order Jim DeMocker to submit to a deposition without the
6 State proving that his deposition testimony is material. The State has not proven that
7 Jim DeMocker's deposition is material, but has presented a list of knowledge and
8 experiences that it alleges that James DeMocker has, or had, in relation to the case
9 against Steven DeMocker. James DeMocker has not had an opportunity to oppose the
10 State's assertion that such information is material to investigation of the case against
11 Steven DeMocker.
12

13 Secondly, this Court cannot order James DeMocker to attend a deposition in
14 Arizona without a showing by the State that unusual circumstances exist that justify
15 putting James DeMocker through "the inconvenience of coming to Arizona for his
16 deposition." *Fenton*, 115 Ariz. 218, 564 P.2d at 907. The State has not alleged any
17 unusual circumstances that would warrant this inconvenience.
18

19 Thirdly, while DeMocker does not concede that the State has complied with the
20 notice requirements of the Arizona Rules of Civil Procedure, the procedure that the
21 State followed, under A.R.S. § 13-4093(A), was to secure James DeMocker's
22 attendance and testimony *at trial*. The procedure outlined under this statute to secure a
23 witness's attendance at trial does not even mention the procedures necessary to secure
24 an out-of-state witness's attendance at a deposition. In fact, as stated above, the only
25
26

1 Arizona statute that addresses deposition of out-of-state witnesses only addresses
2 deposition of witnesses upon request of the defendant. Ariz. Rev. Stat. §§ 13-4111 -
3 13-4116.
4

5 Finally, James DeMocker has had no opportunity to oppose the production of
6 documents and testimony that he is ordered to produce by this Court's Certificate.
7 James DeMocker will likely assert privilege, relevance, materiality and 5th
8 Amendment objections to document production and/or questions.
9

10 James DeMocker has also not had an opportunity to oppose the State's assertion
11 that "there is no undue hardship on the witness in being compelled to attend and testify
12 at the deposition scheduled in the matter." Affidavit, p.2. James DeMocker asserts
13 that there is an undue hardship in his being commanded to miss work and leave his
14 family and travel from his Virginia home to an airport, fly to Phoenix, rent a car and
15 then drive to Prescott... all without having been advanced all the necessary costs, and
16 then reverse the process and head home.
17

18 **IV. CONCLUSION**
19

20 James DeMocker, without submitting to this Court's jurisdiction over him and
21 without waiving the argument that he has not been properly served with any of the
22 documents in his case, submits that Ariz. Rev. Stat. § 13-4093 and the Uniform Act to
23 Secure the Attendance of Witness from without a State in Criminal Proceedings do not
24 grant to this Court the power to order James DeMocker to travel to Arizona to attend a
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1 deposition.

2 DATED this 7 day of March, 2012.

3 ASPEY, WATKINS & DIESEL, P.L.L.C.

4 By 

5 Bruce S. Griffen
6 Attorneys for James DeMocker
7
8

9 COPY of the foregoing emailed
10 this 7 day of March, 2012, to:

11 Honorable Gary Donahoe
12 Division 1
13 Yavapai County Superior Courts
14 Via email to: gdonahoe1@courts.az.gov

15 Division 1
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By: 